

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration between:

**FRATERNAL ORDER OF POLICE,
LODGE No. 5**

-AND-

**AWARD
AND OPINION**

CITY OF PHILADELPHIA, PA

Docket No. 14 390 01527 12
(P/O David Klayman [REDACTED] Discharge.)
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BEFORE: ERNEST WEISS, ARBITRATOR

APPEARANCES: For the Union: MARK L. GELMAN, ESQ.
JENNINGS SIGMOND, P. C.

For the City: TOY SHIELDS, ESQ.
CITY SOLICITOR

ISSUE: Was the discharge of P/O David Klayman [REDACTED] for just cause
and if not, what shall be the remedy?

PRELIMINARY STATEMENT

Having been selected in accordance with the provisions of the Collective Bargaining Agreement between the above parties, I conducted an arbitration hearing on November 13, 2013 at the offices of the American Arbitration Association in Philadelphia, PA, at which time the parties were afforded an opportunity to present evidence and argument in support of their respective positions.

BACKGROUND

On May 31, 2011, a Protection From Abuse Order (PFA) was obtained against P/O Klayman in Bucks County by his girlfriend. On July 11, 2012, the PFA was extended until July 10, 2013. The Order included prohibiting P/O Klayman possessing or acquiring any firearms for the duration of the Order.

On 10/9/12 P/O Klayman was issued his Non-Criminal Giniotek Warnings in the presence of Captain Frank Palumbo #112, 35th and representatives of the of the Internal Affairs Division, FOP Attorney, and Jon McGrody, Vice President of FOP Lodge 5. At that time P/O Klayman was given an opportunity to respond, but he elected not to respond. He was placed on an immediate 30-day suspension with the intent to dismiss effective November 4, 2012 by the Direct Order of the Philadelphia Commissioner of Police Charles Ramsey.

PHILADELPHIA POLICE DEPARTMENT DISCIPLINARY CODE

ARTICLE III

ESSENTIAL REQUIREMENTS FOR DUTY

Inability to perform the essential duties of a sworn police officer including, but not limited to: the exercise of police powers; the carrying and use of a firearm; legally operate a motor vehicle; provide credible testimony in legal proceedings; maintenance of state certification under the Municipal Police Officers Education and Training Commission (MPOETC) (C7)

POSITION OF THE CITY

The City argued in relevant part that a Protection From Abuse Order against P/O Klayman, was extended in Bucks County PA, until July 10, 2013. The PFA includes that he is prohibited from possessing, transferring or acquiring any firearms for the duration of the order. As a result of the firearms restrictions placed upon him in the PFA he is prevented performing the required essential duties and therefore, he can no longer function as a sworn Philadelphia Police Officer.

The The City argued that the PFA rendered him unable to, the exercise of Police powers, the carrying and use of a firearm, and the requirement of state certification under the Municipal Police Officer Education and Training Commission.(MPOETEC)

Consequently, he was initially placed on “desk duty” and later transferred to DPR, a unit presumed to be temporary. However, the FOP pointed out that some officers have been there more than a year and some have been reporting to the DPR Unit about three years or even a longer period, after injuries on the job. The City argued that the length of stay in the DPR Unit depends on the reason for such assignment.

Commissioner Ramsey testified in relevant part that after Offficer Klayman’s PFA was extended and having been stripped of his ability to carry a firearm, his inability to effectively testify in court, he was unable to perform the basic functions of a sworn police officer.

Under cross examination, the Commissioner pointed out that individuals are in the DPR Unit for various reasons including injuries on the job. However, in this instance Officer Klayman was found to be guilty and a Protection From Abuse was issued against him by an independent Judiciary and, since he could no longer

perform the basic duties of a Sworn Police Officer, there was sufficient cause for his termination.

The City also presented the expert testimony Ms. [REDACTED] Y [REDACTED], PhD. Doctor of Philosophy, Masters of Education, Bachelor of Music. She is now the [REDACTED], Certification and Administration of the Municipal Police Officers' Education and Training Commission (MPOETC) Ms. Y [REDACTED] testified extensively regarding the requirement of the 12 hours of required academic training annually, gun training and CPR training annually.

Ms. Y [REDACTED] testified in relevant part that she had reviewed the PFA in this instance and a number of documents given to her by the City of Philadelphia. She further testified that every sworn officer must have the annual academic training as well as the firearm and CPR training. She also stated that Officers must be recertified every two years. She cited Rule 203.14, Revocation of Certification. However, she agreed that a PFA is not discussed in the Rules and Regulations and she did not express a position about the specifics of the instant case at bar.

Another witness called by the City was Sgt. Benjamin Frazier of the Philadelphia Police Internal Affairs Division who interviewed Applicant M [REDACTED] R [REDACTED] on 5/23/11, who was seeking a position with the Philadelphia Police Department and was a Police Officer in the Bristol Borough located in Bucks County where she obtained the PFA against P/O Klayman, her longtime Boyfriend.

In closing, the City argued in relevant part that Article III 002-10 of the Disciplinary Code (C7), clearly provides that the inability to perform the essential duties of a sworn police officer...will result in dismissal on the 1st offense. Therefore, it concluded that the dismissal of P/O David Klayman [REDACTED], was for just cause and his grievance should be dismissed.

POSITION OF THE FOP

The FOP argued in relevant part that the City erroneously assumed that the Bucks County PFA against P/O Klayman was the truth and that the City was apparently using this PFA event as a test case. However, although the PFA was issued in Bucks County Family Court, where Police Officer M [REDACTED] R [REDACTED] was employed by the Bristol Township Police Department, there was no confirmation that her charges against Officer Klayman were truthful as provided in her handwritten application to acquire the PFA (C4) in evidence.

In testimony on his own behalf, grievant Klayman stated, in relevant part that after the PFA was issued he surrendered both his service weapon and his privately owned firearms on June 3, 2011, to the Commanding Officer of the 35th Dist. He was then assigned to administrative duties where he remained until November, 2011 when he was assigned to the DPR Unit for about one year. His duties in the DPR involved receiving various civilian complaints which he recorded, and submitted, as ordinarily required, to the proper divisions within the Police Department for possible further actions.

He agreed that he was acquainted with the implications of a PFA since he had been on the Philadelphia Police Force for over 9 years.

However, there was no testimony regarding the nature of the off-duty domestic incident which did not occur in public and which eventually triggered the PFA against him and eventually resulted in his discharge.

The FOP argued that Officer David Klayman was discharged not for just cause. It asks that he be reinstated to his former position with the Philadelphia Police and made whole. It also asked that the Arbitrator retain jurisdiction for the purpose of the remedy.

DISCUSSION AND OPINION

The off-duty misconduct herein is clearly a domestic quarrel that ended in a physical confrontation by two intimate domestic partners living together, who both happen to be Police Officers, in separate jurisdictions.

The grievant's domestic partner, Officer M [REDACTED] R [REDACTED], was not called to testify regarding the alleged off-duty domestic incident which she describes in her Petition for Protection From Abuse Order, (C4) against P/O David Klayman [REDACTED] the grievant herein, whom she described, on her PFA application as a "...former sexual or intimate partner..." and asks the Court to evict him from her Levittown PA. residence. Additionally, the Family Court granted her request for Officer Klayman to surrender his firearms for the duration of the PFA. However, her own firearm was apparently not restricted by the Court.

Sgt. Frazier #543 Internal Affairs Division, provided a memorandum "...to address some actions that may speak to the judgment of police applicant M [REDACTED] R [REDACTED]" (C4) Her presence at the interview with Sgt Frazier, was apparently as a job applicant to become a Philadelphia Police Officer but, although she claimed that she was reluctant to do so, she was encouraged by Sgt. Frazier to report her own domestic incident since she would be required to report such incidents in her district if she was successful in becoming a Philadelphia Police Officer. She claimed in the interview that she "heard if she took out a PFA, she would have her gun taken from her" and would be somehow adversely affected.(C4)

As described in her Petition for the PFA by Officer R [REDACTED], this domestic argument occurred on May 23, 2011 at 4:30 AM. It escalated into a physical confrontation between these two live-in police officers who were apparently trained in the techniques of physically apprehending and arresting violators. Under such circumstances both are armed and have the capacity to defend themselves.

However, the moving party was Officer R [REDACTED] who moved to acquire the PFA and the subsequent extension on her own, perhaps familiar turf in Bucks County, where she served as a municipal Law enforcement Officer.

The absence of her testimony at the instant arbitration hearing brings with it a negative inference. She was the plaintiff in seeking the PFA against Officer Klayman who was eventually discharged as a result.

Additionally, it must also be noted that during this PFA period she was also actively seeking and successfully applying to become a Philadelphia police officer where her alleged “abuser” was employed. However, in her PFA application she asks the Court in part to ...“**Prohibit Defendant from having any contact with Plaintiff ..., either in person, by telephone, or in writing, personally or through third persons, including but not limited to any contact at Plaintiff’s school, business or place of employment, except as the court may find necessary...**”(C4)

The obvious question arises that, if she truly needed a PFA against him, why would she arrange to be working for the same employer, the City of Philadelphia and thereby risk possibly being in his proximity every workday, with the PFA still enforce.

Her chosen arrangement to be employed where he was also working at the time, reveals her contradiction that she fears to be in his presence, as she claimed in her PFA request against him. However, there is nothing in her PFA application to indicate that she was at the same time applying for a Police Officer position with his Employer, where she is likely to be in his presence during her workday. She can’t have it both ways. Her acceptance of her new position, with the City of Philadelphia Police, contradicts her central claims to the PFA court to “E. Forbid Defendant from having any contact with Plaintiff’s...business or place of employment,..."

However, she was seeking to restrain him from being in her presence, yet at the same time, by accepting her new position as Police Officer with the City of Philadelphia, she knowingly elected to be employed where he is likely to be during his workday. Therefore, I find that her actions clearly contradict her claim to the PFA Court in (C4) that she was afraid to be in his presence.

Significantly, there is nothing in the record that he violated the PFA order in any way. Additionally, there is nothing in the record before me to indicate that his private off-duty conduct could have seriously damaged his Employer's public image.

Therefore, having thoroughly considered all the evidence including the arguments and allegations of both parties, I have concluded for the above stated reasons that Officer Klayman's, off-duty domestic confrontation with his partner, resulting in a PFA against him and the temporary loss of his fire arms was not just cause for his termination.

The City of Philadelphia is hereby directed to reinstate him to his former or similar position with full seniority back pay and negotiated benefits, minus outside earnings.

Should the parties be unable to determine the remedy, then for that sole purpose, as requested, I hereby retain jurisdiction.

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The undersigned arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above parties, and having duly heard the proofs and allegations of the parties, AWARDS as follows:

His grievance is sustained.

For the above stated reasons, I find that P/O David Klayman was discharged not for just cause.

The City is hereby directed to make him whole with respect to seniority, benefits and back pay minus outside earnings. Additionally, as requested, I hereby retain jurisdiction for the sole purpose of implementing this Award.


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ERNEST WEISS, ARBITRATOR

STATE OF: NEW JERSEY
COUNTY OF: SOMERSET

On this 23rd day of December, 2013, before me personally came and appeared Ernest Weiss, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged that he executed same.